IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI ex rel. RYAN FERGUSON,	)	
Petitioner,	)	
v.	)	WD76058
DAVE DORMIRE, Warden, Jefferson City Correctional Center,	)	
Respondent.	)	

SUGGESTIONS IN OPPOSITION TO
PETITION FOR WRIT OF HABEAS CORPUS

The Petitioner returns to this Court asking that the Court set aside his conviction because he is innocent. Petitioner seeks to persuade this Court to accept his petition by reminding this Court that in its previous decision, this Court expressed concern that some of his allegations gave the Court "pause." *Ferguson v. State*, 325 S.W.3d 400, 419 (Mo. App. W.D. 2010). Given the allegations made by Petitioner at that time and his description of the alleged "new evidence," the Court's concern was readily understandable.

Since then, the Cole County Circuit Court conducted a lengthy evidentiary hearing that established that the claims Petitioner asserted to this Court earlier were untrue and that the actual evidence available 1) was not new, 2) did not support Petitioner's claim of innocence, and 3) was

significantly different than how Petitioner had described that evidence to this Court.

One example that is both demonstrative of the inaccuracy of Petitioner's claims and supportive of the conclusions that accepting the petition is improper, is the Petitioner's unbelievable argument that Mr. Erickson's recantation must be true because he knows he is risking a possible perjury charge. (Petition, pp. 51-53). This is the same argument that Petitioner made at the oral argument of his Rule 29.15 appeal.[1] During oral argument, Petitioner repeatedly told this Court that Mr. Erickson's trial testimony was perjury.[2]

What is now known, because Petitioner had a full and fair opportunity to litigate his claims in circuit court, is that Mr. Erickson had absolutely no fear of perjury charges. In fact, for at least five months before that oral

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[1] For the sake of consistency, and simplicity, the attachments and exhibits identified and attached to these Suggestions will be denoted by the exhibit letters used at the Cole County habeas trial.

[2] "It's the perjury that overwhelms this case. It's the admission of that." (Respondent's Exhibit 1, p. 9).

argument, Petitioner's attorney was also Mr. Erickson's attorney.[3] Instead of counsel warning Mr. Erickson of the risk of perjury, Mr. Erickson's recorded telephone conversations reveal his belief that Petitioner's counsel is going to obtain his freedom once Petitioner was released. (Trial Exhibits R68, R68e, R68i). In fact, Petitioner's counsel announced on national television, in a 48 Hours broadcast on March 26, 2011, that she would obtain the release of Mr. Erickson after Petitioner has been freed. (Respondent's Exhibit 2).

While the State understands why Petitioner's allegations gave this Court "pause," a second hearing to litigate claims that have already been proven to be untrue is unjustified and a waste of judicial resources.

There are other allegations the Petitioner has previously asserted to this Court that have subsequently proven untrue. The most obvious and significant is the false claim that Mr. Erickson had recanted his trial testimony, exonerating Petitioner.

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[3] Respondent's Exhibit 3 is one of several letters to the Missouri Department of Corrections evidencing the attorney/client relationship between Petitioner's attorney and Mr. Erickson. This relationship was, and is, a very relevant fact in assessing Mr. Erickson's motives for recanting. The State is confident that had the State failed to disclose such a pertinent fact, another claim of "prosecutor misconduct" would have been raised.

At the time of oral argument, Mr. Erickson had not exonerated anyone. The only evidence Petitioner had available was an affidavit and videotape of Mr. Erickson acknowledging that he actually committed the murder and that Petitioner was present. (Petitioner's Exhibits 34i, 34j). Only much later did Mr. Erickson actually parrot what Petitioner claimed Mr. Erickson would say. In fact, as the circuit court noted, in Mr. Erickson's second "recantation," an affidavit dated February 9, 2011, Mr. Erickson acknowledged only that Petitioner did not know that Mr. Erickson intended to commit a crime that night. (Petitioner's Exhibit 34d)(Habeas Findings, p. 18).[4]

Petitioner not only asks this Court to allow him to relitigate the issues already decided by the circuit court, but he is also asking this Court to relitigate claims this Court previously rejected. Petitioner again argues that Judge Crane knowingly used perjured testimony, "which is cognizable in a post-conviction proceeding." *Ferguson v. State*, 325 S.W.3d 400, 406 (Mo. App. W.D. 2010)(Petition, p. 18, ¶3). This Court found that Petitioner failed to "demonstrate that the prosecutor was or should have been aware that

[4] Actually, at the Cole County hearing, Mr. Erickson's testimony was that he did not know if he committed the crime because he had no memory. Lack of memory was one of the theories by which Petitioner's attorney promised to get Mr. Erickson released. (Trial Exhibit 68e).

Erickson had perjured himself at Ferguson's trial." *Ferguson*, 325 S.W.3d at 407, n. 5.

While this Court expressed understandable concern over the seriousness of the claims made by Petitioner, the Court evidenced the proper level of caution to not "jump to conclusions" about the validity of those claims. This Court judiciously recognized that an evidentiary hearing would determine the merit of these assertions, a reasonable response to the claims. A full and fair evidentiary hearing has now established those claims to be meritless and, in several instances, completely untrue.

Not liking the outcome, the Petitioner now returns to this Court asking that the evidence and conclusions of a fair and complete hearing on the merits be ignored and considered a nullity.

Standard of Review

This Court's order of February 11, 2013, asks the Respondent to address the standard of review the Court should use in considering the Petitioner's request. The Petitioner boldly asks this Court to ignore the results of the hearing he requested and received in circuit court. Petitioner offers no explanation or justification for such a monumental waste of precious judicial resources other than he does not like the result.

Under federal habeas practice, the procedure for appellate review of a final order issued by a trial (district) court is well established, with either

party having the right to file an actual appeal to the appellate (circuit) court, 28 U.S.C. § 2253(a), so long as a judge issues a certificate of appealability for a state detainee's appeal, 28 U.S.C. § 2253(c)(1). In reviewing a district court's denial of a federal habeas petition, the appellate court reviews the district court's findings of fact for clear error and its conclusions of law *de novo*. *Paulson v. Warden*, 703 F.3d 416, 418 (8th Cir. 2013).

In Missouri, there are admittedly no set standards for that review. There are, however, several well-established legal principles, including judicial economy, *res judicata*, post-conviction procedures, and a strong public policy against endless litigation and favoring finality, which suggest that this Court should not accept this petition because there are no new claims.

Unlike federal practice, the notion that a petitioner who fully litigates a habeas claim in circuit court can then automatically "appeal" that denial to this Court has no legal support.

In order to proceed to a superior court after being unsuccessful in circuit court, the Petitioner should be required, at a minimum, to prove he has something new and substantial to litigate. Simply hoping to convince a different judge (or judges) to reach a different result than the previous judicial proceedings becomes a waste of time and resources that serves no legitimate purpose.

"Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties." *Sangamon Associates Ltd. v. Carpenter 1985 Family Partnership Ltd.*, 280 S.W.3d 737, 748 (Mo. App. W.D. 2009).

Habeas proceedings are extraordinary remedies and the notion that he can "appeal" from an adverse decision from a lower court because he is dissatisfied with the results is unsupported by any law. Again, under federal law, there is a statutory right. 28 U.S.C. § 2253(a).[5] But no similar right to appeal exists in Missouri.

It seems reasonable to require, therefore, that before seeking habeas relief from this Court, Petitioner must prove that he has some new, legitimate, substantial constitutional claim that is new since his petition was heard in circuit court. In other words, there are two legitimate ways for any Petitioner to obtain a hearing in this appellate Court.

The first method would be where a circuit court denied a petition without a hearing; a petitioner then can file that same petition with this Court and convince this Court the claims in the petition merit a hearing.

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[5] The review available is also very structured and very limited under those same statutes.

Because no fact finding or conclusions were made by any court concerning the merits of the claims, this Court can undertake its own independent review. *See Blackmon v. Missouri Bd. of Probation and Parole*, 97 S.W.3d 458 (Mo. banc 2003) (authorizing original habeas in appellate court after circuit court's denial without hearing); *Bromwell v. Nixon*, 361 S.W.3d 393 (Mo. banc 2012) (same).

But this Court has clearly stated that in cases where a circuit court has undertaken a review of a habeas petition, this Court's "review is limited to a determination of whether the habeas court exceeded the bounds of its jurisdiction." *State ex rel. White v. Davis*, 174 S.W.3d 543, 547 (Mo. App. W.D. 2005) (review via certiorari of grant of habeas). This review is by a petition for a writ of certiorari, however, and not a petition for writ of habeas corpus. This petition – for certiorari – is granted by this Court "as a matter of course and a matter of right." *Id*. This is the second situation where a petitioner may legitimately seek review – where the circuit court denies a petition for writ of habeas corpus after a hearing and appellate review occurs through a writ of certiorari.

Petitioner did not, however, avail himself of such a request and, therefore, has no "right" to review. Instead, Petitioner seeks a successive review of a petition that has already been addressed and denied on the merits.

Under these circumstances, Petitioner should not receive review by this Court unless he asserts and brings forth new substantial allegations, meaning new since the previous habeas heard in circuit court. The long-standing requirement of habeas review of defaulted claims is that the Petitioner establish "new evidence of innocence." *Murray v. Carrier*, 477 U.S. 478, 496 (1986). After all, the available post-conviction remedies available to Petitioner "are designed to provide a 'single, unitary, post-conviction remedy, to be used in place of other remedies,' including the writ of habeas corpus." *State ex rel. Koster v. Jackson*, 301 S.W.3d 586, 589 (Mo. App. W.D. 2010). To overcome this barrier, it is a fundamental requirement that the Petitioner provide "new reliable evidence." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). New cannot mean simply "rehashing" the claims that were denied in circuit court; those cannot be deemed "new" at this point. If Petitioner wants this Court to "review" the claims already raised and decided by the circuit court, certiorari is the appropriate writ. But if he wants this Court to entertain a writ of habeas corpus, he must present evidence of a new substantial claim, or at least of new reliable evidence that he has uncovered since the previous habeas hearing.[6]

[6] Petitioner must also show that he could not have obtained this new, reliable evidence sooner through the exercise of due diligence.

Otherwise, a Petitioner may simply "shop" for a judicial forum endlessly through what was intended to be an extraordinary writ until he finds a court who interprets the same recycled facts in a manner to his liking. Petitioner makes no pretense that he has obtained new evidence which this Court should evaluate; Petitioner simply disagrees with the conclusions of the circuit court and hopes this Court will view the evidence different. The four claims in the petition before this Court are the same four claims asserted, and addressed, in circuit court. There are no new claims. And while Petitioner grudgingly acknowledges that this Court must give deference to the factual determinations of the circuit court (Petition, p. 103), the entirety of the petition's 154 pages are actually attacks on the accuracy of the circuit court's factual findings.

This is not to say that a circuit court's decision is unreviewable. It is reviewable through a certiorari petition. But to seek relief from a Missouri's appellate court after thorough review of habeas claims in circuit court, the Petitioner may not simply file successive habeas claims any more than he may refile his Rule 29.15 motion in an appellate court or a circuit court. Petitioner must present the appellate court with new claims, or at least new reliable evidence to support a claim that has already been addressed. Otherwise, finality becomes impossible.

Petitioner Must Show "Cause" for Further Review

The principle that habeas review is not meant as a substitute for post-conviction review or direct appeal is well established in Missouri. *State ex rel. Green v. Moore*, 131 S.W.3d 803, 805 (Mo. banc 2004). Thus, for habeas review, the Petitioner must show "cause and prejudice" for the failure to raise a claim earlier. 131 S.W.3d at 805, n.5. To show "cause," the Petitioner can "establish that the grounds relied on were not 'known to him' during" the earlier proceedings. *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 126 (Mo. banc 2010). Simply filing a successive petition in a higher court, alleging the same claims litigated in circuit court, makes it impossible for the Petitioner to prove, or even argue, that the claims pending before this Court were not "known to him" earlier. They were known, and were litigated.

The United States Supreme Court held that successive habeas petitions are an abuse of writ, particularly when the claims could have been raised in the first petition. *McCleskey v. Zant*, 499 U.S. 467, 489 (1991). While Respondent recognizes that the federal procedural rules and statutes are not binding on how Missouri processes successive habeas petitions, they do provide a framework for review that is logical and consistent with the fair administration of justice.

In 1966 Congress amended 28 U.S.C. §2244, dealing with habeas review by adding subparagraph (b) which said in part:

> When after an evidentiary hearing on the merits of a material fact issue, or after a hearing on the merits of an issue of law, a person in custody … has been denied … an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus on behalf of such person need not be entertained … unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application ….

Federal Rule 9(b) also said: "A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and if the prior determination was on the merits …." (Emphasis added).

Once more, the State acknowledges that these provisions are not binding on this Court. Nevertheless, in the absence of any existing framework in Missouri, they offer significant guidance to any court considering a successive petition. Any petition that fails to allege any new claims or facts is fundamentally flawed because, by legal definition, it is inconsistent with the central aspect of the extraordinary writ of habeas corpus.[7]

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[7] Respondent notes that Congress modified 28 U.S.C. § 2244 again in 1996, so that the federal court cannot consider repetitive claims at all, 28

In fact, Petitioner makes no pretense that he has "new" evidence or claims since the earlier petition and hearing. The heading Petitioner gives to the present claims to this Court is titled:

> "Newly discovered evidence presented at habeas hearing on April 16-20, 2012."

(Petition, pp. 18-19).

As will be noted below, each of these present claims were, in fact, addressed in the first habeas hearing, and addressed on the merits.

This successive petition is premised on one overt desire. After a jury trial, with full appellate review, a post-conviction proceeding, with full appellate review, and an unsuccessful habeas hearing, Petitioner hopes that members of this Court will view the evidence and claims differently and come to a different factual conclusion.

Every resident of the Department of Corrections would also like similar, unlimited reviews. And without some clear, rational standards such as those set forth above, successive and unlimited habeas review might become a "right" available, denigrating the importance of the "Great Writ" in

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U.S.C. § 2244(b)(1), and new claims in a second petition only in extraordinary circumstances, 28 U.S.C. § 2244(b)(2).

our legal system. Disagreeing with the decision of a jury or a judge does not provide a justification for successive proceedings.

Standard of Review if Petition for Writ is Granted

Should this Court accept the petition for writ of habeas corpus, there seems to be little dispute as to the standard of review applicable. On page 103 of his petition, Petitioner reluctantly acknowledges that the circuit court's findings and conclusions are given the weight and deference that would be given to a court-tried case by a reviewing court.

That is, indeed, the proper standard. A full, fair hearing before a judge with full authority and jurisdiction to hear a case should not be ignored or nullified. That would not be consistent with any notion of judicial economy.

Were this Court to appoint a master, the master's findings and conclusions are accorded the weight and deference given to trial courts in court-tried cases. *State ex rel. Winfield v. Roper*, 292 S.W.3d 909, 910 (Mo. banc 2009); *State ex rel. Lyons v. Lombardi*, 303 S.W.3d 523, 525 (Mo. banc 2010). Deference is given to the ability and opportunity of the judge to review the evidence and gauge the credibility of witnesses. *Id.*

Reviewing Jerry Trump's Testimony

One of the issues this Court asks the State to address specifically is the impact of the circuit court's determination that Jerry Trump's in-court

identification of Petitioner was false on Petitioner's claim to a gateway to innocence.

One obvious flaw in Petitioner's claim before this Court is his express request that this Court give deference to only one small factual determination of the circuit court, but reject every other factual finding made by that same court concerning Mr. Trump's recantation.

One major fallacy (but not the only one) in Petitioner's argument is the fact that the "Trump lied" claim is not new. It has always been the Petitioner's position that Trump's identification of him was false. The recantation was not the basis for the circuit court's conclusion that Mr. Trump could not actually identify the murderers at trial. The circuit court made its decision based on the old evidence, the evidence presented at the criminal trial, not anything "new."

> "Indeed, it is the implausible nature of Trump's jury trial testimony that gives weight to the credibleness of the recantation …."

(Findings, p. 17).

The court further found that "Mr. Trump's story about his wife sending him a newspaper and this somehow jogging his memory is simply too fantastic to be believed." (Findings, p. 17). The circuit court also explicitly found Mr. Trump's ever-evolving efforts to blame Judge Crane for the false

identification "to be a feeble attempt to both clear his conscience while still attempting to evade responsibility …." (Findings, p. 17).

Thus, the circuit court did its own evaluation of the plausibility of Mr. Trump's ability to identify the two murderers years later and concluded he could not. It is important to remember that the admissibility of Mr. Trump's identification was what was litigated out of the presence of the jury, and its admissibility depended upon whether the state had improperly suggested whom Mr. Trump should identify. Once it was determined the State did not send the newspaper to Mr. Trump, or otherwise provide pictures to him,[8] the identification was admissible. The credibility of that identification and its weight were for the fact finder to assess. The circuit court found it was not credible based on the circumstances described at the criminal trial.

Without new evidence of actual innocence, there is no "gateway through which a habeas petitioner [can] pass to have his otherwise barred constitutional claim considered on the merits." *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc 2000). Again, the circuit court's conclusion as to Mr. Trump's ability was based on the same evidence the trial jury heard, evidence which Petitioner told this very Court was not persuasive at trial:

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[8] The same conclusion the circuit court reached in the habeas proceedings.

THE COURT: Well, there was an eyewitness wasn't there?

MS. ZELLNER: Actually there was not.

The eyewitness a Mr. Trump the -- who testified and is a convicted sex offender, that was brought out at trial, did not witness any part of the crime. Mr. Trump claimed that at first he saw nothing because the light was in his eyes, but then he claimed that -- and did an in court identification of Ryan Ferguson not having anything to do with the crime.

THE COURT: But certainly at the scene?

MS. ZELLNER: He put him at the scene. And I don't know how creditable the jury found that evidence because they certainly had the testimony of Charles Erickson describing Mr. Ferguson as having strangled and robbed the victim.

(Respondent's Exhibit 1, Oral Argument Transcript, pp. 5-6)(emphasis added).[9]

[9] "The doctrine of judicial estoppels exists to prevent parties from playing fast and loose with the court." *In re Fletcher*, 337 S.W.3d 137, 143

Thus, at the hearing on his post-conviction proceeding, the Petitioner advocated the same conclusion reached by the circuit court – Mr. Trump's identification of Petitioner at trial did not affect the outcome of the trial because that testimony was not persuasive or credible. Thus, Petitioner did not sustain his burden before the circuit court – nor can he do so before this Court – by demonstrating a reasonable probability that the outcome of the trial would have been different. *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 128 (Mo. banc 2010) *quoting Strickler v. Greene*, 527 U.S. 263, 280 (1999). "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 131 S.Ct. 770, 791-792 (2011).

The circuit court's conclusion was exactly the same as Petitioner's counsel – his identification under the circumstances the jury heard it "was not material and merely cumulative." (Findings, p. 32). More important, the circuit court did not make this finding based on "new evidence" (because the

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(Mo. App. W.D. 2011). Though in Missouri it is applicable to a party's sworn testimony, the underlying principle remains that parties should not be allowed to assert inconsistent positions on the same issue in different proceedings. "Were parties allowed to take inconsistent positions at their whim, it would allow chaotic and unpredictable results in our court system, which of course would be problematic for a host of reasons." *Id*. at 144.

actual recantations by Mr. Trump were not credible), but based on the facts and circumstances of the identification as developed at the 2005 trial.

Petitioner now asserts that Mr. Trump's identification was crucial, and wishes to continue to argue that what transpired between Mr. Trump and Judge Crane remains in dispute. (Petition, p. 69). The circuit court, after hearing the testimony of Mr. Trump, Mr. Hawes, and Judge Crane, and after reviewing the trial transcripts, made a credibility decision that Mr. Trump's allegations against Judge Crane are false. (Findings, p. 17). That issue should not be the subject of further repetitive litigation.

Petitioner also cites cases which he thinks supports his argument that any perjury must, as a matter of law, be material and would have changed the outcome of the case. Yet, the very case Petitioner cites establishes otherwise.

In *State v. Fletcher*, 948 S.W.2d 436 (Mo. App. W.D. 1997), Ms. Fletcher pled guilty to participating in a burglary with Mr. Stafford. 948 S.W.2d at 438. Six days later, Ms. Fletcher testified at Mr. Stafford's burglary trial, asserting there was no burglary. *Id*. Mr. Stafford was nevertheless found guilty of burglary, in spite of Ms. Fletcher's perjury. *Id*. Perjury includes no "requirement that the untrue testimony before a jury successfully deceive the jury." *Id*. at 438. In other words, it is not true that perjured testimony must be credible, or even persuasive, for the witness to be guilty of perjury. Mr.

Trump's identification of Petitioner at the trial was not particularly persuasive, given the facts and circumstances of that identification as he described it in 2005. Petitioner so stated to this Court. (Respondent's Exhibit 1, p. 6).

Thus, Petitioner is in error when he alleges that the circuit court's findings are "legally impossible." (Petition, p. 104). To the contrary, not all perjured testimony can be said to undermine confidence in the outcome of a trial. The evidence that convicted Petitioner was the testimony of Mr. Erickson. Petition's guilt was based on the jury finding his compelling, detailed testimony credible. To receive post-conviction relief, Petitioner must show the conviction occurred as a result of the perjury. *State v. Arndt*, 881 S.W.2d 634, 637 (Mo. App. S.D. 1994). He does not meet that standard.

While Petitioner devotes numerous pages repeating the same credibility issues the jury heard during Petitioner's cross-examination of witnesses at the trial, the compelling fact remains that individuals do not plead guilty and accept a 25-year sentence for a crime they did not commit. Mr. Erickson's initial equivocations and minimizations of his conduct are, according to the testimony of Petitioner's own expert, common and expected. (Hearing Tr. 102)("Guilty people always try to minimize their culpability.").

Mr. Trump's testimony that he did see two young white males at Mr. Heitholt's car was true. (Findings, p. 29). But the jury would not have

convicted Petitioner unless they ultimately believed Mr. Erickson to be credible. "The 2005 trial testimony of Mr. Erickson is credible." (Findings, p. 31).

The circuit court's legal analysis of the evidence and its conclusions is entirely accurate and legally sound:

> "Not only must this Court find that the recantation is credible, it must also find clear and convincing evidence sufficient to undermine the Court's confidence in the correctness of the judgment. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003) at 548."

(Findings, p. 31).

That is, in fact, the correct standard utilized by the circuit court. Once more, Petitioner would like this Court to independently undertake a *de novo* review hoping that this Court would succumb to a temptation to come to a different result. Use of the same legal standard and the same set of facts, but coming to a different result could not be justified based on any appropriate factor.

Finally, Petitioner attaches a video clip[10] from an alleged juror attempting to obtain a conclusion that prejudice exists because one juror now so states. Regardless of the numerous problems that exist regarding the authenticity of this recording, or even the identity of the speaker, the "affidavit or testimony of a juror is inadmissible and is not to be received in evidence for the purpose of impeaching the verdict of the jury." *Storey v. State*, 175 S.W.3d 116, 130 (Mo. banc 2005). No further discussion is warranted.

The circuit court's decision regarding Mr. Trump's trial testimony is a completely fact-based analysis, and is based on the same facts the jury heard at trial. The circuit court does not believe the facts and circumstances allow one to conclude that Mr. Trump could spontaneously identify the assailants beyond the fact that they were young, white males. It is not the recantation upon which the court made that conclusion, but the information presented at trial.

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[10] It is ironic that Petitioner objects to using an authenticated video of the underlying criminal trial, but assumes an unsworn statement on a television show is admissible.

There was, and is, therefore, no new credible evidence upon which the Petitioner can assert his innocence and which would then allow him to relitigate all of his barred claims.

The Recantation Claims Do Not Create a "Gateway" to Review Petitioner's Barred Claims

Respondent continues to emphasize the undeniable fact that the present petition before this Court presents no new claims and is, instead, an attempt to relitigate factual claims already addressed by the circuit court. This fact is important because it is for this reason Petitioner's petition must be denied.

It was always Petitioner's position that Mr. Erickson and Mr. Trump were lying. Both were cross-examined and impeached at trial. The "new" evidence Petitioner claimed to have were the recantations of these two witnesses. Mr. Erickson's recantation has been proven to be false. Mr. Trump's recantation has been found to be partially true.

Petitioner offers this Court no new facts or evidence regarding either witness beyond what has been litigated. "[T]he evidence of actual innocence must be strong enough to undermine the basis for the conviction so as to make the petitioner's continued incarceration … manifestly unjust even though the conviction was otherwise the product of a fair trial." *Amrine v. Roper*, 102 S.W.3d 541, 547 (Mo. banc 2003).

The circuit court's skepticism of the recantations is legally appropriate and completely justified under these facts, the Petitioner's criticism notwithstanding. Recantations are not a new phenomena, and Missouri courts have justifiably viewed them with suspicion.

> "Recanting testimony is exceedingly unreliable and regarded with suspicion; it is the right and duty of the court to deny a new trial where it is not satisfied such testimony is true."

State v. Harris, 428 S.W.2d 497, 501 (Mo. banc 1968); *State v. Cook*, 339 S.W.3d 523 (Mo. App. E.D. 2011); *State v. Garner*, 976 S.W.2d 57, 60 (Mo. App. W.D. 1998).

The recantations of both Mr. Trump and Mr. Erickson were ever-evolving and the product of "coaching." While Petitioner takes offense at the circuit court's suspicion that the "evolution" of Mr. Trump's and Mr. Erickson's recantations was due to prompting by Petitioner's defense team, the facts leave little doubt that the catalyst for the evolving recantations was not a sudden twinge of conscience from either witness.

Jerry Trump

While Mr. Trump's first affidavit said that he has "had the opportunity to reflect upon the events that occurred in the early morning hours of November 1, 2004 …" (Petitioner's Exhibit 2, ¶5), the fact is that the affidavit

was prompted by repeated visits by Petitioner's investigator.[11] (Petitioner's Exhibit 1a, pp. 23-24, 44). In the first affidavit, Mr. Trump stated that he told Christine Varner that he "would not identify the individuals." (Petitioner's Exhibit 2, ¶8). Yet, at his deposition taken by Petitioner's counsel, Mr. Trump stated he did not know specifically who Christine Varner was:

> Q. Paragraph 8: "That within days of the murder, I told Christine Varner, who was employed by the same company as I was, that I could not identify the individuals." Is that true?
>
> A. I don't remember talking to her specifically, but anybody that I would have talked to in that period of time, that would have been my response.

(Petitioner's Exhibit 1a, p. 11).

[11] The Respondent is not suggesting that it is illegal or improper for Petitioner's attorneys to prepare the actual affidavits signed by Mr. Trump. But the language in the affidavits suggesting Mr. Trump spontaneously decided to offer this information is incredible. Mr. Trump was, in reality, "reluctant." (Petitioner's Exhibit 1a; Trump depo. P. 23).

And when questioned further about this paragraph, Mr. Trump acknowledged that he had no recollection of speaking to this person, in spite of his affidavit:

> Q. You testified that you don't know who Miss -- that you have no recollection of ever speaking to Miss Varner about this case. Is that what you testified?
>
> A. That's correct.

(Petitioner's Exhibit 1a, pp. 61-62).

Later, at the prompting of Petitioner's investigator, Mr. Trump produced a second affidavit in which he said that he wanted to supplement his first affidavit. (Petitioner's Exhibit 3, ¶4). Yet, under oath, Mr. Trump stated that he did <u>not</u> feel any need to add to his first affidavit:

> Q. Oh, all right. Did you feel any desire or need to fix or amend your first affidavit?
>
> A. No.

(Petitioner's Exhibit 1a, p. 68).

Mr. Trump then acknowledged that information was placed in the affidavit because the investigator thought that information was important.

(Petitioner's Exhibit 1a, p. 76). The discrepancies between the two affidavits are striking; the two affidavits are inconsistent.[12]

The law is quite clear that Petitioner cannot obtain habeas relief under his actual innocence claim unless he has new reliable evidence:

> "[S]uch a claim requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts or critical physical evidence -- that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful." (Emphasis added).

Schlup v. Delo, 513 U.S. 298, 324 (1995).

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[12] It is also important to note what Mr. Trump's recantations did not contain. Unlike Shauna Orndt, the other janitor who testified at the post-conviction proceeding that Mr. Ferguson was not one of the two men she saw, *Ferguson v. State*, *supra* at 413, Mr. Trump did not testify at the circuit court hearing that he had eliminated Mr. Erickson or Petitioner as the two young while males he saw near the victim's car.

The use of the words "reliable" and "trustworthy" are not superfluous. Otherwise, every recantation by a key witness would be deemed "new" and would entitle a petitioner to relief – in spite of the well-established recognition that courts review recantations with suspicion.

Such suspicion is heightened when the recantations are inconsistent and incredible.

Mr. Erickson

Mr. Erickson's evolving recantations must be viewed with even greater suspicion.[13] Mr. Erickson issued several recantations which he acknowledged were untrue. His narrative eventually migrated towardsa claim that he was threatened with the death penalty if he did not cooperate:

> "[M]y attorney kept saying that I needed to try to keep them from charging me with first degree murder, like they had done to Ryan. My lawyer thought that if I didn't cooperate they might try to execute me since it was such a high profile murder and so gruesome. One of the first

[13] Noticeably absent from Mr. Erickson's testimony was any affirmative statement by Mr. Erickson that he did not kill the victim. ("I might have killed him." Hearing Tr. 437).

> things he asked me was if I would cooperate to ensure they didn't try to execute me. I, of course, said yes."

(Petitioner's Exhibit 34a; Erickson affidavit of August 29, 2011, p. 16).

Petitioner continues to argue there is merit to Mr. Erickson's claim, despite the fact that Mr. Erickson's attorney and Judge Crane testified that the death penalty was never a consideration. (Hearing Tr. 558, 630-631). Petitioner suggests that the death penalty was an option because "only" the Missouri Supreme Court had held the execution of 16-year-olds to be unconstitutional and the issue had not been decided by the United States Supreme Court. (Petition, p. 47). Regardless of whether the issue was unresolved before the United States Supreme Court, the Respondent does not believe any prosecutor is free to disregard a final decision by the Missouri Supreme Court. Mr. Erickson was lying when he claimed he pled guilty to avoid the death penalty.

Mr. Erickson's attorney, Mark Kempton, explained why Mr. Erickson wanted to plead guilty – because he was guilty. (Hearing Tr. 625). Petitioner makes no mention whatsoever of the testimony of Mr. Kempton in his lengthy petition because that testimony conclusively refutes Mr. Erickson's various recantations:

> Fundamentally, from day one, he wanted to plead guilty. I discussed with him the challenges that could be

> made to those statements. I not only read the transcripts, but watched the videos, talked to him about what they showed, talked to him about the options that existed and how we could challenge those statements. He did not want to do that.

(Hearing Tr. 627).

The timing of Mr. Erickson's recantations remains a significant factor in establishing their falsity. The initial "recantation," a written statement by Mr. Erickson dated November 20, 2009 (Petitioner's Exhibit 34i), was not a recantation. Mr. Erickson merely painted Petitioner an aider and abetter, not the individual who actually strangled Mr. Heitholt.

Yet, it was this statement upon which Petitioner asked this Court to grant him a new trial during the Rule 29.15 appeal. (Respondent's Exhibit 1, p. 8). More significant is the fact that before oral argument, Petitioner's counsel had also become Mr. Erickson's counsel as well. (Hearing Tr. 424). While Petitioner's counsel was telling this Court that Mr. Erickson (her client) was guilty of perjury (Respondent's Exhibit 1, pp. 8-9), Mr. Erickson was also being assured that he would be released once Petitioner was released. (Hearing Tr. 430-431; Trial Exhibits R68e, R68i, R68).

The assertion in the petition that Mr. Erickson had a disincentive to recant is refuted by the record, and the circuit court had substantial and

competent evidence to support its conclusion. The circuit court also had significant evidence to support its conclusion that Mr. Erickson had a motive to recant falsely.

Petitioner argues that "undisputed evidence indicates that Mr. Erickson would have been released in five years if he kept quiet." (Petition, p. 134). Nothing could be further from the truth. The State introduced telephone conversations between Mr. Erickson and his parents in which he expressed concern about being called a "rat" (Trial Exhibit R67), and statements by Mr. Erickson where he said "I fear for my life" (Trial Exhibits R50 and R52). Mr. Erickson acknowledged having two subsequent felony assault convictions for fighting in prison. (Hearing Tr. 451). He told his mother if he kept getting in fights, he was never going to get out of prison. (Hearing Tr. 453; Trial Exhibit R68). Attorney Kempton had to contact the prison because of concerns for Mr. Erickson's safety. (Hearing Tr. 632-633; Trial Exhibit K2). The circuit court most certainly had a factual basis for its conclusions, yet Petitioner seeks a new habeas hearing to relitigate these facts.

Petitioner also makes the assertion that it was improper for the circuit court to review a video of Mr. Erickson's trial testimony in determining credibility (Petition, pp. 121-125), ignoring the fact that the videotape was evidence submitted to the court without objection (Trial Exhibit R58; Hearing

Tr. 685). Any objection the Petitioner now has to the video's use at trial should have been raised in the previous habeas proceedings. There is no dispute that the circuit court was required to make credibility determinations. In post-conviction proceedings and other litigation, a court may make those decisions based solely on a transcript, with no opportunity to observe the witness.

In this case, the circuit court had the benefit of not merely reading the trial testimony of witnesses, but the ability to observe them. The video was not "edited;" it was of the entire trial.[14] The Petitioner also introduced video statements of Mr. Erickson (Petitioner's Exhibit 34j), along with several other videos. The cases from other jurisdictions which Petitioner cites offer absolutely no support for his complaint. Those cases simply state that even when an appellate court has a video of the trial testimony, the appellate courts are not free to make their own credibility decisions and must defer to the fact finder. *Mitchell v. Archibald*, 971 S.W.2d 25, 30 (Tenn. App. 1998); *Potts v. Commonwealth*, 172 S.W.3d 345, 349 (Ky. 1999).

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[14] Petitioner asserts that the fact that the camera man did not record bench conferences somehow is relevant to whether the video was useful in assessing Mr. Erickson's credibility. Again, the time to have voiced that objection was at the hearing.

Judge Green was the fact finder in this case, and it was his role to determine credibility. Mr. Erickson's trial testimony, which was the central focus of the Petitioner's claims, most certainly could be assessed by watching his demeanor, whether he hesitated when speaking, and numerous other non-verbal cues that both judges and jurors use in assessing credibility.

Indeed, the contrast between Mr. Erickson's evasive, inconsistent, disjointed and rambling testimony at the habeas hearing, and his forthright demeanor at trial is compelling. There was no error in using this evidence, admitted without objection or limitation, to aid the fact finder in assessing credibility. Indeed, the circuit court should be commended for taking the extra time to review several hours of testimony in an effort to evaluate fairly the evidence.

The Claim that Mr. Boyd Committed the Crime is Procedurally Barred

In his initial petition, Petitioner alleged that there was evidence that Mr. Boyd was the murderer.

Petitioner does not believe that he needs to prove that any evidence to support this claim is new or was unavailable. His position is based on a unique, and completely erroneous, reading of *Schlup v. Delo*, *supra*.

According to Petitioner, he may rely on any evidence "not presented at trial" regardless of whether it was available or not, and regardless of whether

trial counsel simply made a reasonable strategic decision to not use that evidence. (Petition, p. 115). Petitioner's "authority" for this position is not case law, but an amicus brief filed in the circuit court on his behalf. (Petitioner's Exhibit 139). The circuit court's analysis used the proper legal standard, as explained earlier.

And the notion that as long as the evidence was not actually used by defense counsel at the criminal trial, that evidence must be deemed "new" for purposes of obtaining habeas relief, has no support under the law. Nevertheless, Petitioner must make such an argument because it is the only possible basis he has for reasserting his claim regarding Mr. Boyd.

As noted, this claim was included in the circuit court petition. Petitioner called Mr. Boyd as a witness at the habeas hearing. Yet he made a conscious decision to not proceed further with this claim. (Findings, p. 41). The habeas proceedings continued, in which Petitioner attempted to prove his innocence and have his conviction set aside.

Thus, the Boyd claim is not new under any established legal standard. This is not a mere civil case where a party can dismiss a claim "without prejudice." The standard for habeas claims to be heard by this Court are the same as what existed in circuit court – Petitioner must show cause and prejudice for the failure to not raise the claim sooner. *Green v. Moore*, 131 S.W.3d 803, 805, n.5 (Mo. banc 2004).

Petitioner can establish no "cause" for failing to raise this claim before now, and he cannot do so because he did assert this very claim earlier. Once more, Petitioner has silently ignored the record he made in circuit court.

Furthermore, Missouri law very clearly establishes that the suspicions and conjecture Petitioner raises about Mr. Boyd do not provide a viable defense. Missouri prohibits evidence suggesting a third person committed the crime in the absence of a direct connection between that person and the murder:

> To be admissible, evidence that another person had an opportunity or motive for committing the crime for which a defendant is being tried must tend to prove that the other person committed some act directly connecting him with the crime. The evidence must be of the kind that directly connects the other person with the *corpus delicti* and tends clearly to point to someone other than the accused as the guilty person. Disconnected and remote acts, outside the crime itself cannot be separately proved for such purpose; and evidence which can have no other effect than to cast a bare suspicion on another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.

State v. Nash, 339 S.W.3d 500, 513 (Mo. banc 2011).

Boyd has no "direct connection" to the murder. The Petitioner's claim that "physical evidence connects Boyd to the murder" (Petition, p. 56), is followed by an admission that there is no physical evidence linking Mr. Boyd to the crime (Petition, p. 56). It appears that Petitioner believes every witness to a crime is a suspect worthy of litigation. The other "evidence" Petitioner suggests is a "timeline" he insists he developed at trial. As the circuit court correctly noted, the witnesses in this case – including Mr. Boyd – gave only approximations. (Findings, p. 32).

Additionally, all of this "evidence" was available at the time of trial in 2005. Dr. Blum, Mr. Buckley, Mr. Boyd, and any number of other witnesses were available. We can assume that the decision to not proceed with an attack on Mr. Boyd was a matter of trial strategy by trial counsel. And given the lack of any evidence connecting Mr. Boyd to the murder, the strategy was sound. As with nearly every claim Petitioner raises, this is essentially an ineffective assistance of counsel claim which should have been asserted in the post-conviction proceeding. By dropping the Boyd claim in the circuit court proceeding, Petitioner is barred from reasserting it now.

PETITIONER'S CLAIMS

Once more, the claims pending before this Court are ones already litigated in circuit court. In fact, the claims are in the same order and delineated identically to how they were designated by Petitioner in his earlier petition, and addressed by the circuit court. (Findings, pp. 2-3).

Though recognizing that the law requires deference to the circuit court's factual and credibility determinations (Petition, p. 103), Petitioner then ignores that standard of review and argues the same interpretation of the facts he advocated below. Apparently assuming this Court will not review the record below, Petitioner alleges that none of the circuit court's legal or factual determinations are accurate. As Respondent has already demonstrated above, the circuit court had significant evidence to support its denial of relief.

Claim I: Recantations

The credibility of the recantations, the motive for these recantations, and the ever-evolving nature of the recantations have all been exhaustively litigated. The one characteristic permeating both Mr. Trump's and Mr. Erickson's recantations is the ever-evolving nature of both. Neither witness's recantation can be credible because each witness has made multiple recantations that are inconsistent and irreconcilable.

Yet, Petitioner continues to assert that he should have his conviction set aside because these recantations are new evidence that support a "free standing claim of actual innocence" under *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 543 (Mo. banc 2003), and because this evidence leaves any fact finder "with an abiding conviction that the evidence is true." *Id.* at 547-548. Petitioner does not specify, however, which version of each witness's recantation is "true."

A. Jerry Trump

A review of Mr. Trump's first affidavit, written and prepared after several visits from Petitioner's investigator (Petitioner's Exhibit 1a, pp. 24-28), shows that nowhere in that recantation does Mr. Trump indicate that his identification of Petitioner was inaccurate. (Petitioner's Exhibit 2). Yet, as late as September 2, 2011, Mr. Trump was swearing to the accuracy of the first affidavit. (Petitioner's Exhibit 1a, p. 60).

Two months later, Mr. Trump's second affidavit claimed prompting by Mr. Trump's desire to clarify matters (Petitioner's Exhibit 3), yet Mr. Trump testified he felt no need to amend or fix his first affidavit (Petitioner's Exhibit 1a, p. 68).

But, more important, the first affidavit and the second affidavit are not reconcilable. As just one example among many, Mr. Trump's first affidavit asserted that "I identified them [Petitioner and Erickson] because I had seen a video that was circulated in the prison that triggered my memory." (Petitioner's Exhibit 2, ¶11). Only later did the narrative develop that Judge Crane coerced a false identification.

Mr. Trump's conflicting affidavits show a disregard for the truth. A truthful recantation will not change. Trump recanted because he learned that Mr. Erickson recanted and began to doubt his own trial testimony. Though Petitioner, himself, did not consider Mr. Trump's testimony before the jury terribly persuasive (Respondent's Exhibit 1, p. 6), the "value" of Mr. Trump's recantation was multiplied by "amending" Mr. Trump's claims to adding false charges of prosecutor manipulation and misconduct. A false identification, no matter how inconsequential to the jury's verdict, takes on additional legal significance when it is alleged to be the product of prosecutorial misconduct. It is not mere coincidence that, over time, both witnesses' recantations migrated towards blaming the prosecutor.

In turn, Mr. Erickson's evolving recantations arose, at least in part, when informed that Mr. Trump was now recanting. (Trial Exhibit R68k).[15]

For this evidence to justify setting aside a jury verdict that has been affirmed twice by this Court, Petitioner must produce facts giving the circuit court and this Court "an abiding conviction that the evidence is true." *Amrine*, *supra*.

This evidence cannot be true; it is inherently inconsistent and overtly false.

B. <u>Mr. Erickson</u>

Petitioner's initial attack on the credibility of Mr. Erickson's trial testimony begins by setting forth several alleged errors or inconsistencies in that trial testimony. This litany establishes why the petition should be denied – the Petitioner cites his trial attorney's cross-examination of Mr. Erickson in delineating these inconsistencies. In other words, this is not new evidence; the jury heard these alleged inconsistencies in 2005 but found Mr. Erickson's testimony to be credible.

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[15] Mr. Erickson was overheard speaking to his mother on the telephone informing her that Mr. Trump recanted – a conversation that took place on December 28, 2010 – the very same day Mr. Trump signed his second affidavit. (Hearing Tr. 434).

This is not new evidence to support a habeas claim. In fact, this Court noted in its most recent opinion that these claims are not new evidence and that Petitioner's trial counsel successfully "undermined Erickson's credibility." *Ferguson v. State*, 325 S.W.3d at 417. Trial counsel even produced an expert witness to challenge Erickson's ability to accurately recall the crime.

Ironically, Mr. Erickson's present recantations are significantly more inconsistent and impossible to reconcile factually – yet now Petitioner asks this Court to find those recantations truthful and credible.

A portion of Petitioner's argument relies on the testimony of Dr. Blum and Mr. Buckley. Neither of these witnesses had "new" evidence; both were available to testify in 2005 and neither testified based on any new facts, only those existing at the time of the 2005 trial. In fact, Mr. Buckley believed he had actually been contacted by trial counsel about testifying for Petitioner. (Hearing Tr. 114).

Furthermore, Petitioner's arguments regarding the testimony of these witnesses at the circuit court hearing is simply that – argument. For example, the petition states: "Dr. Blum further testified that Erickson's trial testimony about the beating and murder is totally inconsistent with the forensic evidence." (Petition, p. 41). No citation to the record is provided because the pronouncement is argumentative. What the evidence did prove

was that Dr. Blum's conclusions were often incorrect. For example, he produced a nail puller at the hearing below and asserted it was the more likely weapon used to strike Mr. Heitholt (Hearing Tr. 148), but later reluctantly admitted the tool he produced could not have caused the injuries (Hearing Tr. 165, 187).

The most troubling argument, however, is the claim that Mr. Erickson must be telling the truth when he recants because he is looking at perjury charges and having his negotiated sentence increase. There is significant evidence, however, that Mr. Erickson is motivated to recant falsely because of promises and inducements from Petitioner's legal team that Mr. Erickson will also be released. The most overt evidence is the 48 Hours interview by Petitioner's counsel so stating. (Respondent's Exhibit 1).

While zealous advocacy cannot be faulted, it is inaccurate to suggest that Mr. Erickson lacks a strong motive to falsely recant. Because of fights in prison and a label of a "snitch" or "rat," Mr. Erickson was concerned that he would never be released from prison. (Trial Exhibits R16, R17, R32, R50, R52, R67, R67b, R68, R68d, R68e, R68i, R68k). Mr. Erickson is heard telling his parents that Petitioner's counsel is going to try to get him out and that she intends to use his "memory stuff." (Trial Exhibits R68e, R68i).

Unknown to this Court during the Rule 29.15 oral argument, when Petitioner repeatedly referred to Mr. Erickson as a perjurer (Respondent's

Exhibit 1, pp. 7, 8, 9, 10, 30), was the fact that Mr. Erickson was actually Petitioner's attorney's client as well. While the Respondent makes no accusation that this was illegal,[16] this was a significant, relevant fact that candor dictates should be disclosed.

By pleading guilty and testifying at Petitioner's trial, Mr. Erickson received a sentence of 25 years. By recanting, Mr. Erickson seeks to void that sentence and set himself free.

Another myth permeating the petition is the claim that Mr. Erickson was "fed" information by the police and truly has no memory of the murder.

Mr. Erickson did not initially confess to the police – he confessed to friends about the crime and Petitioner's involvement in that crime. At the criminal trial, Mr. Erickson testified about those statements:

> A. I – I pulled up to John Alder's house with Nick Gilpin. And when we pulled up to his house, I told him there was something I wanted to talk to him about. And I told him that I thought that Ryan Ferguson and I were responsible for the murder of Kent Heitholt. And I

[16] Although the State is confident that had the prosecutor been involved in any such arrangement, accusations of "prosecutor misconduct" would be made.

explained to him some of the background about that night. I explained to him that we were at By George's and that Ryan wanted to rob someone. And I explained to him that I was having memory problems. And that I was – he was – I was having problems trying to figure out if what I remembered was an actual memory or these things in my mind were memories or dreams.

Q. What did you tell Mr. Gilpin that you did?

A. Well –

Q. You're already testified you were both at George's?

A. Yeah.

Q. What did you tell him?

A. Well, later at Nick's house – I didn't get very descriptive when we were at John's, but at Nick's house I told him that I hit Kent Heitholt in the head with a tire tool. That I saw Ryan Ferguson on the ground strangling him. That I thought that I got sick. And that I told a cleaning lady to go get help.

Q. As we've heard on the video with Detective Short, the first video that was played, you knew, when

Detective Short was talking to you, he told you, "Nick Gilpin's been in here, and he's told us what you'd said?"

A. Yes, that's correct.

Q. Okay. And that's the same guy.

A. That's the same guy.

(Trial Tr. 861-863).

Mr. Erickson also recounted his conversation with Art Figueroa:

Q. And what, if anything, did you confide in Art Figueroa about?

A. I told him that Ryan Ferguson and I had – I thought we killed Kent Heitholt. That I had hit Kent Heitholt. Ryan Ferguson had strangled him. Told him that I told a cleaning lady to get help. Told him that I felt bad about it. I didn't know what to do. I was thinking about coming forth and giving my DNA and – I don't know. I think I told him that Ryan threatened to kill me. I know I told that to Nick too. I forgot to put that in there.

(Trial Tr. 866).

Additionally, Mr. Erickson told Investigator Hawes that he had seen a red car leaving the Tribune parking lot just prior to the murder. (Hearing Tr.

654-655). That red car was driven by Mr. Boyd, who was leaving the parking lot moments before Mr. Heitholt's murder. (Hearing Tr. 508, 656).

This evidence negates Petitioner's claims of police coercion or amnesia on the part of Mr. Erickson.

There was significant evidence supporting the jury's and circuit court's conclusion that Mr. Erickson's trial testimony was accurate. Petitioner's claim that "every single detail of the murder which only the killer would know was provided to Erickson by law enforcement" (Petition, p. 75), is simply inaccurate.

The credibility of Mr. Trump's and Mr. Erickson's various recantations has been litigated during a hearing in which all of Petitioner's present allegations were addressed. There is nothing new to justify a second hearing on the same issues, other than Petitioner's hope that a different judge may reach a different conclusion based on the same evidence. That is not a basis for granting relief in this case.

Claim II: Suborning Perjury

Once more, Petitioner advances a recycled claim based on evidence already presented and evaluated. In fact, most of Petitioner's argument is focused on the testimony of witnesses whom this Court has already determined to not be credible. Petitioner refers to the discredited testimony of Ms. Orndt and Mr. Mallory (Petition, pp. 69-70), as support for his petition.

The testimony of both these witnesses was found to be not credible, not only in the circuit court habeas proceeding, but also in the previous post-conviction proceeding. (Trial Exhibit R57). This Court affirmed those findings. *Ferguson v. State*, *supra* at 413. Nevertheless, Petitioner requests a hearing so that this Court will entertain discredited testimony.

Furthermore, Petitioner should not be permitted to persuade this Court to entertain his petition based on a claim that is contrary to the very evidence he advocates. The claim is that Mr. Trump's perjury was procured by Judge Crane, who encouraged Mr. Trump to lie about seeing a newspaper in prison. That is the assertion in Claim I. Yet, Petitioner's assertions in Claim II are that even if Judge Crane did none of the things Mr. Trump accuses him of, Judge Crane is still guilty of suborning perjury.

The circuit court determined allegations against Judge Crane were untrue. Petitioner proposes no new evidence that would justify relitigating this issue.

Claim III: *Brady* Violations

Petitioner asserts that the State violated *Brady v. Maryland* by not disclosing information about Barbara Trump, Mike Boyd and Kim Bennett. "When reviewing a habeas petition premised on an alleged *Brady* violation, this Court considers all available evidence uncovered following the trial." *Griffin v. Denney*, 347 S.W.3d 73, 77 (Mo. banc 2011). To receive relief for a *Brady* claim, the Petitioner must show a reasonable probability of a different result at trial. *Id*.

Petitioner relies heavily on the post-hearing affidavit of trial counsel, Charles Rogers, to support these claims. (Petitioner's Exhibit 113). Ironically, the circuit court permitted the submission of this affidavit over the State's legitimate hearsay objection "to bring some finality to this case and address all issues." (Findings, p. 36). Unfortunately, there appears to be no finality of any issue, no matter how thoroughly litigated.

A. Barbara Trump

Investigator Hawes testified that Mr. Trump's wife indicated that she did not recall sending the newspaper to Mr. Trump. (Hearing Tr. 667). The circuit court concluded that Mr. Trump had not seen the newspaper article in prison but, more important, also determined that Mr. Trump could not actually identify the two killers of Mr. Heitholt. (Findings, p. 30). Like Petitioner's own counsel (Respondent's Exhibit 1, p. 6), the circuit court did

not believe that Mr. Trump's in-court identification affected the outcome of the trial and was not a determining factor in the jury's verdict. Given these facts, Ms. Trump's statement[17] is not sufficient to "undermine confidence in the outcome of the trial." *Griffin*, 347 S.W.3d at 77.

B. Mike Boyd

Petitioner returns to his discredited claim that Mr. Boyd, in conjunction with Dr. Blum's estimates, create a timeline that eliminates Petitioner as the murderer. This is not a new claim. And, as the circuit court concluded, "Mr. Boyd's testimony contributed nothing to the real issue(s) in this matter and his entire testimony is immaterial." (Findings, p. 12).

While the Petitioner either minimizes or ignores the fact that Mr. Boyd made it clear that his times were estimates, the circuit court properly noted this significant fact. (Hearing Tr. Pp. 538-539; Findings, pp. 37-38). Dr. Blum's estimates as to the time necessary to murder Mr. Heitholt were also approximations:

[17] As the circuit court noted, it is not known what Ms. Trump's testimony would be. Though identified as a witness for Petitioner, and though appearing at the trial, Petitioner did not actually call her as a witness.

> "The blunt force trauma took four to five minutes. Could have taken a little less. The strangulation part was, in my opinion, shorter by about half, approximately two to three minutes."

(Hearing Tr. 154). Even Mr. Trump's description of the time frame that evening is an estimation:

> Q. Do you have any idea what time that was?
>
> A. Very close to 2:00. I'm not sure exactly, but 2:00, 2:10, 2:20, 2:15 maybe.

(Hearing Tr. 207).

As the circuit court noted, had Petitioner's timeline been accurate, "then Mr. Heitholt would have to have still been alive when Ms. Orndt called the police at 2:26 a.m. – to report he was dead." (Findings, p. 38). The circuit court reasonably concluded that this theory did not create unreasonable probability that the outcome of the trial would have been different.

C. Kim Bennett

Once more, the Petitioner seeks to persuade this Court to grant a hearing by "reinventing" the evidence. Ms. Bennett testified that she saw Petitioner and Mr. Erickson leave the bar on the night of the murder, enter Petitioner's maroon vehicle directly across the street from the bar, and leave. (Hearing Tr. 465-466, 485). Ms. Bennett's credibility suffers from her

assertion that as a teenager, she snuck into a nightclub for the alleged purpose of not drinking alcoholic beverages. (Hearing Tr. 463). The circuit court was justified in having doubts as to her credibility.

A glaring problem with this testimony is that both Mr. Erickson and the Petitioner, himself, testified that Petitioner's blue car was parked two blocks away on the street. (Trial Tr. 168, 1824-1825). Both killers identified the location of the vehicle on a map. (Trial Tr. 168, 1825). Though concerned over her credibility (Findings, p. 26), the circuit court found that this evidence would not have been helpful to Petitioner because it impeached his own trial testimony (Findings, p. 26). Her testimony would not have been helpful to the defense.

Petitioner asserts that Judge Crane was aware of Bennett's information. The Petitioner repeatedly questions nearly every decision or action by Judge Crane, implying a sinister motive throughout the petition. One example relates to the questioning of Mr. Erickson and Petitioner about the location of the car. Petitioner states that Judge Crane was "preoccupied" with the location of the car during the trial (Petition, p. 150), and "the reason for Prosecutor Crane's preoccupation was not apparent" (Petition, p. 151). "But now, Bennett's habeas testimony divulges Prosecutor Crane's motivation." (Findings, p. 151). Petitioner then ominously proclaims this proves Judge Crane knew of Bennett's statements.

To the contrary, a reading of the trial transcript demonstrates that Judge Crane's "motive"[18] was to demonstrate that Mr. Erickson's testimony about the events of that night were accurate and not the result of a false memory or dream. Judge Crane established through his cross-examination of the Petitioner that many of the facts and events Mr. Erickson told the jury were factually accurate – including the location of Petitioner's car that night.

This not only negates Petitioner's attempt to demonize Judge Crane, but also provides further support for the circuit court's conclusion that Mr. Erickson's trial testimony in 2005 was truthful. Information like the location of the car, who was wearing what clothing that evening, and conversations with friends are all facts that could not be "fed" to Mr. Erickson by the police. To his dismay, Petitioner's trial testimony actually bolstered the credibility of Mr. Erickson's trial testimony. And it was the jury's conclusion that Mr. Erickson's confession was truthful that resulted in Petitioner's conviction.

[18] A more accurate description is "legitimate trial strategy."

Claim IV: Jury Selection

Petitioner's fourth claim for relief is a contention that the jury selection procedures in Lincoln County, where his jury was drawn, departed from §494.400-.505, *et seq*. RSMo. Cum. Supp. 2005. Petitioner litigated this claim in his first state habeas corpus petition. *Ryan Ferguson v. Dave Dormire*, No. 08AC-CC00721 (Cole County Circuit Court). Judge Callahan found the circuit court's review of the claim was barred by default (Respondent's Exhibit 4, pp. 2-7). In an alternative ruling, after an evidentiary hearing, the circuit court found that Petitioner did not show that there was a substantial failure to comply with the statutes (Respondent's Exhibit 4, pp. 7-8). This Court denied the appellate petition (Respondent's Exhibit 5). The Missouri Supreme Court then denied the successive petition (Respondent's Exhibit 6). These courts have already resolved the claim against Petitioner.

Missouri Supreme Court Rule 91.22 governs this situation.

> When a petition for a writ of habeas corpus has been denied by a higher court, a lower court shall not issue the writ unless the order in the higher court denying the writ is without prejudice to proceeding in a lower court.

Neither this Court nor the Missouri Supreme Court's order denying the writ was without prejudice (Respondent's Exhibits 5, 6).

Petitioner argues that Rule 91.22 does not apply because Petitioner alleges that he is probably actually innocent. Petitioner offers no precedent to support that proposition. Indeed, to the contrary, the plain text of Rule 91.22 does not contain any exception to the prohibition against filing a second habeas corpus petition.[19] Nor did the previous post-conviction rule, Rule 27.26, authorize repetitive claims. To the contrary, the rule barred consideration of repetitive claims. Missouri Supreme Court Rule 27.26(d) (repealed 1988). Rule 91.22 does not recognize an ability to file a second habeas corpus petition after a denial with prejudice, and Petitioner fails to refer the Court to any court decision that has allowed a second consideration of a claim in a state habeas corpus petition.

[19] Indeed, the express language of Rule 91.22 does not give the lower court any power or discretion to issue a writ of habeas corpus after a writ has been denied by a higher court unless that denial is without prejudice. Given that the rule does not authorize the filing of a second habeas petition at all, and there are no decisions granting relief on a second habeas petition, Petitioner's entire petition for writ of habeas corpus should be dismissed under Rule 91.22.

Petitioner contends that the previous state habeas courts did not resolve the question of "actual innocence;"[20] thus, the jury selection issue can be reconsidered yet again. Petitioner's contention is incorrect. After an evidentiary hearing, Judge Callahan found that Petitioner did not show that there was a substantial failure to comply with the statute (Respondent's Exhibit 4, pp. 7-8). Both appellate courts agreed (Respondent's Exhibits 5, 6). Because Petitioner's claim was denied on the merits in the initial habeas corpus proceeding, he is not entitled to a second consideration of the issue. Moreover, Petitioner had the opportunity to litigate "actual innocence" in his initial state habeas petition. Petitioner's failure to do so does not warrant a second petition.

The second reason Claim 4 should be dismissed is procedural default – an alternative reason relied on by Judge Callahan. Petitioner did not show good cause to overcome the default (Respondent's Exhibit 4, pp. 3-7). To

[20] Generally speaking, once the direct appeal and the post-conviction proceeding has passed, then a state habeas petitioner has defaulted on the unpresented ground for relief. A state habeas court can review the defaulted ground only if the offender can show good cause and actual prejudice or that he is probably actually innocent, a high standard. *See Clay v. Dormire*, 37 S.W.3d 214 (Mo. banc 2000).

overcome the procedural default, Petitioner must show both good cause and actual prejudice. To show actual prejudice the Petitioner must show that the alleged error worked to his "actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 215 (Mo. banc 2001) *quoting United States v. Frady*, 456 U.S. 152, 170 (1982). At no point does Petitioner allege or demonstrate that he suffered any prejudice from the alleged error in compiling the venire pool. Petitioner does not contend that as a result of the jury selection process in Lincoln County there was a sitting juror who was biased or should have been struck for cause. *Young v. Bowersox*, 161 F.3d 1159, 1161 (8th Cir. 1998) (no prejudice from ineffectiveness claim where the sitting jurors were unbiased); *Strong v. State*, 263 S.W.3d 636, 648 (Mo. banc 2008) (same). Review of the claim is barred by default.

The procedure employed by the Lincoln County Circuit posed no risk of jury packing, nor did it interfere with the randomness of jury selection. Here, the presiding judge simply imposed an additional condition on excusing jurors whose professed hardships did not, in the judge's opinion, rise to the level of "undue or extreme" hardship that would warrant excusal under §494.430. Unlike the irregularities in other cases, nothing about the judge's policy in this case could conceivably have had any impact on the fairness of the trial. *State v. Gresham*, 637 S.W.2d 20, 26 (Mo. banc 1982); *State v.*

Sardeson, 174 S.W.3d 598, 601 (Mo. App. S.D. 2005); *Hudson v. State*, 248 S.W.3d 56 (Mo. App. W.D. 2008).

No legitimate interest is served by reversing a conviction and remanding for new trial. The consequence of vacating the conviction is that Petitioner will get a second chance to argue for acquittal, despite the fact that he has already been found guilty in a trial that has been found to be fair not once, not twice, but six times.[21] No legal authority requires that a new trial must automatically be given simply because the procedure for excusing jurors from the qualified jury list was irregular, if the procedure neither lent itself to abuse by authorities (*e.g. Gresham*) nor interfered with the randomness of the jury selection process (*e.g. Sardeson* and *Hudson*). To the contrary, controlling precedents from the Missouri Supreme Court holds that excusing some potential jurors from the qualified jury list for reasons not expressly enumerated by the statute, as happened here, does not warrant reversal absent a showing of actual prejudice. *State v. Anderson*, 79 S.W.3d 420, 431 (Mo. banc 2002).

During the last state habeas litigation, the circuit court concluded that the requirement of randomness was fulfilled by the Lincoln County jury

[21] The fairness of the trial was confirmed on direct appeal, the post-conviction litigation and the four prior state habeas litigations.

selection process (Respondent's Exhibit 4, pp. 7-8). Phrased succinctly, Petitioner's jury was fair. Acknowledging the fairness of his trial, Petitioner contends that there are other statutory values such as preserving a citizen's obligation to serve as a juror and preserving the judicial function of making the determination to excuse the juror (Petition, p. 77). But, as noted, it remained a judicial function to excuse the juror from service. The presiding Judge reviewed each request for excusal individually and determined that while the reason given did not qualify for excusal under the statute, the court would nevertheless excuse prospective jurors from jury service if they would agree to perform six hours of community service and pay fifty dollars. Likewise, this action also preserved the statutory value of preserving a citizen's obligation to serve the community through community service.

But the Court need not resolve these issues. Neither of the values asserted by Petitioner concern the actual fairness of Petitioner's trial; thus, relief in the form of a new trial by way of a writ of habeas corpus is not warranted. The purpose of the writ is to protect an offender's rights, and neither of the concerns identified in *Preston* affects the actual fairness of the trial. And the actual fairness issue was resolved against petitioner in the initial state habeas petition (Respondent's Exhibit 4, p. 8). Further, Petitioner has no right to have particular individuals sit on his jury; all that he has a right to is a fair jury. Petitioner does not contend that any of the

jurors that heard his case were biased; thus, he can show no prejudice from his case being heard by those jurors. Any alleged error does not warrant setting aside the judgment of a criminal proceeding on collateral attack if the error had no effect on the judgment. *Young v. Bowersox*, 161 F.3d 1159, 1161 (8th Cir. 1998) *citing Wright v. Nix*, 928 F.2d 270, 273 (8th Cir. 1991). The Missouri Supreme Court upheld and applied this form of analysis in *Strong v. State*, 263 S.W.3d 636, 648 (Mo. banc 2008).

Similar analysis is seen in the Supreme Court's decision in *Riveria v. Illinois*, 129 S.Ct. 1446 (2009). In *Riveria* the defendant attempted to use a peremptory challenge to remove a venireperson. The state trial court erroneously denied to defendant the peremptory challenge. *Id*. at 1450. The Supreme Court determined that no retrial was necessary because the defendant was, after all, tried before a jury composed of individuals not challengeable for cause. Similarly, with Petitioner, the jurors who sat on Petitioner's jury at trial were not excusable for cause and were unbiased. The analysis of *Young*, *Riveria* and *Anderson* is consistent.

The third reason Claim 4 should be denied is because Petitioner is relying upon a court decision that is not retrospective. To support his claim, Petitioner refers the Court to *Preston v. State*, 325 S.W.3d 420 (Mo. App. E.D. 2010). A decision such as *Preston* applies only prospectively because it concerns a procedural matter - - how a venire pool is selected.

> In such cases, if the holdings pertain to procedural matters, they are applied prospectively only; if they pertain to substantive matters, they are applied both prospectively and retrospectively. *State v. Walker*, 616 S.W.2d 48, 49 (Mo. banc 1981). Generally, however, retrospective application is limited to those cases "subject to direct appeal," *see*, *e.g.*, *Erwin*, 848 S.W.2d at 484, or "to all pending cases not finally adjudicated," *see*, *e.g.*, *State v. Stewart*, 832 S.W.2d 911, 914 (Mo. banc 1992); and is sometimes further limited to those cases where the issue has been preserved. *See*, *e.g.*, *Erwin*, 848 S.W.2d at 484.

State v. Ferguson, 887 S.W.2d 585, 587 (Mo. banc 1994). Petitioner's direct appeal became final in 2007. Accordingly, Petitioner is requesting the Court apply the reasoning in *Preston* retroactively to vacate his conviction. The Missouri Supreme Court does not authorize such relief.

The fourth reason to deny relief on this ground is that Petitioner shows no prejudice. In a state habeas corpus proceeding, a habeas petitioner should be required to show prejudice from any alleged trial error. The Missouri Supreme Court has made clear that the state habeas rules for state court review now track those established by the federal courts. See *Brown v. State*, 66 S.W.3d 721, 726 (Mo. banc 2002); *State ex rel. Nixon v. James*, 63 S.W.3d

210, 215 (Mo. banc 2001). For an offender to receive federal habeas corpus relief, then the offender must show prejudice. For a federal habeas petitioner to receive relief under 28 U.S.C. § 2254, the offender must show that the alleged constitutional error had a substantial and injurious effect on the trial. See *Fry v. Pliler*, 551 U.S. 112 (2007) *citing Brecht v. Abrahamson*, 507 U.S. 619 (1993). A petitioner meets that standard only where the reviewing court is in grave doubt about the effect of the error on the jury's verdict. *O'Neal v. McAninch*, 513 U.S. 432, 445 (1995). Petitioner does not allege any prejudice from the *Preston* issue. Nor can he show such under *Young*, *Strong* and *Riveria*.

Conclusion

For all these reasons, the petition for writ of habeas corpus should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent through the eFiling system, this 5 day of March, 2013, to:

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